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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 49

WILLIAM J. OFFER, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 766-772) is reported at 211 F. 2d 719.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1954 (R. 766). The petition for a writ of cer-

tiorari was filed on April 24, 1954, and granted on June 7, 1954 (R. 775). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1) and former Rule 37(b)(2), F. R. Crim. P.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix hereto *infra*, pp. 36-37.

QUESTIONS PRESENTED[1]

1. Whether, where an admission is made to law enforcement officers after the date of the acts charged as crimes, it is to be so far treated as a confession that, in the absence of corroboration, it is inadmissible.

2. Whether a conviction can be sustained where there is, apart from an admission made to law enforcement officers after the date of the acts charged as crimes, no proof of the *corpus delicti*.

3. Whether, in convicting petitioner the jury, and in sustaining his conviction the court below, in fact admitted, as against him, statements of his co-defendant which, as a matter of law, were not competent evidence against him.

STATEMENT

Petitioner William J. Opper and Robert George Hollifield, Sr., were jointly charged, in an indictment (R. 1-10) containing four substantive counts and a conspiracy count, with violating 18 U. S. C. § 281 (*infra*, p. 36) and with conspiring to violate § 281 and to defraud the United States within the meaning of 18 U. S. C. § 371 (*infra*, p. 37).

Count 1 of the indictment in substance charged that Hollifield, an employee of the United States, directly agreed to receive $1750.00 as compensation from petitioner for services to be rendered in relation to purchase requests in which the United States was directly interested, the serv-

[1] Only the questions in respect of which review was granted (R. 775) are here set out.

ices to consist of Hollifield's recommending the approval and procurement by the Air Force of the United States of certain types of sun goggles and ski goggles. Count 2 charged that on March 1, 1951, in Dayton, Ohio, Hollifield received from petitioner as compensation for the rendition of such services $50.00. Count 3, a charge similar to Count 2, set forth the receipt by Hollifield from petitioner of $250.00 on or about March 1, 1951, while Count 4, a charge similar to Counts 2 and 3, recited the receipt of approximately $200.00 from petitioner under similar circumstances on the 5th day of August 1951. As to each of these counts it was charged that petitioner aided, abetted, counseled, induced and procured the defendant Hollifield unlawfully to receive such compensation for the services rendered, in violation of 18 U. S. C. § 2 (*infra*, p. 36).

Count 5 charged petitioner and his co-defendant Hollifield with conspiring to commit offenses against the United States and to defraud the United States by conspiring to violate 18 U. S. C. § 281, and to defraud the United States within the meaning of 18 U. S. C. § 371, in that (1) they did conspire to cause Hollifield to directly receive from Opper compensation for services rendered and to be rendered by Hollifield which services would consist in Hollifield's recommending the approval and procurement by the Air Force of certain types of sun goggles and ski goggles, and (2) they did conspire to defraud the United States of and concerning its right (a) to have the lawful functions of Hollifield performed free from unlawful impairment, obstruction, collusion, partiality, improper influence, bias, dishonesty and fraud, and (b) to have Hollifield's duties performed untainted by the unlawful receipt by him of compensation from outside sources for services rendered in connection therewith. Count 5 charges that the alleged conspiracy began on or about October 1, 1950 and ended on or about September 26, 1951.

A motion for severance was denied (R. 14, 15) and the defendants were tried together.

The evidence established that Hollifield was employed by the United States Air Force at Wright Field, Dayton, Ohio, being a designer supervisor (aviation clothing and equipage). In this position he worked under the general supervision of the Chief, Medical Specifications Branch, with opportunity for "wide use of creative initiative and independent judgment in planning and supervising the accomplishment of land survival equipment." His duty was to review and discuss first samples produced "to determine compliance with specifications." As project supervisor of survival kits,[2] it was Hollifield's duty to pass upon the conformity to specifications of the various items in the kit, including goggles (Govt. Ex. 15, R. 90, RE 49-51;[3] R. 86-90).

Petitioner, a resident of Chicago and a sub-contractor on various projects for the equipping of survival kits, submitted to two prime contractors compasses and goggles for the kits (Govt. Ex. 21, R. 135, RE 68-72; Govt. Ex. 30, R. 176, RE 85-90; R. 609-610). It was proved that, on January 23, 1951, certain goggles which had been supplied by petitioner to a prime contractor had been recommended for rejection by the Chief, Physiology Branch Aero Medical Laboratory, because of "marked deviations" from the applicable specification (Govt. Ex. 27, R. 376, RE 80; R. 168, 374-377).

Shortly after the recommended rejection, Hollifield secured a conference with Lieut. Frederick Moss, a project engineer of the Physiology Branch, and other employees of the Air Force (R. 377, 378). Petitioner attended this conference and in his presence Hollifield urged that the goggles be accepted (R. 378). At the conference it was

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[2] A comprehensive article made up of a number of components such as a compass, raincoat, goggles, machete, and necessary life saving equipment (R. 129).

[3] "RE" refers to Volume III of the Record which contains the exhibits, the pagination of which does not follow consecutively that of Volumes I and II. This designation of Vol. III as "RE" follows the scheme used in the Government's Brief in Opposition herein at the last Term.

concluded that Hollifield should embody his reasons for recommending acceptance in a routing and record sheet and this was done (R. 378-379). The routing and record sheet (Govt. Ex. 28-a, R. 362, RE 81; R. 379-382) stated: "Confirming conversation between F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialities Branch, it would be appreciated if your office would reconsider the use of the goggles submitted to determine their conformity with subject item, in view of the following information." While the routing and record sheet was signed by Randall W. Briggs, it bore the initials of Hollifield and, in asking for reconsideration, stated substantially the reasons Hollifield had advanced at the oral conference above described as to why the rejection of the goggles should be changed (Govt. Ex. 28a, R. 362, RE 81; R. 379-382). Reconsideration was granted and the use of the substitute goggles submitted by petitioner was recommended on February 3, 1951 (Govt. Ex. 28-b, R. 382, RE 82; R. 380-382).

Over the objection of the petitioner, **Francis A. Regan,** a Special Agent of the F.B.I., was permitted to testify concerning certain oral admissions made to him by petitioner concerning the payment by petitioner to the co-defendant Hollifield (R. 322-324). Petitioner objected, unsuccessfully, to such testimony upon the grounds that the government had not introduced any independent evidence of the *corpus delicti*[4] corroborating petitioner's statements or admissions (R. 238, 240, 245, 322). Agent Regan testified that on October 10, 1951, petitioner, in the Chicago office of the F.B.I., stated, among other things, that while in the office of a business associate in Dayton, Ohio, he met the co-defendant Hollifield; that thereafter he met Hollifield on approximately fifteen occasions at Wright Field, Ohio, and at Chicago, Illinois (R. 322); that in April, 1951, during a meeting in Chicago, Hollifield asked for money,

[4] I.e., that petitioner had paid or agreed to pay money to Hollifield for services rendered or to be rendered.

stating he was about to lose his home; that he gave Hollifield $1000.00; that such payment constituted a loan; that petitioner admitted he had never seen Hollifield's home, that to his own knowledge he did not know that he had a home, that he did not obtain any security for the loan; that he had no receipt or record to evidence the loan and that there was no agreement as to interest; that approximately two weeks following the $1000.00 payment to Hollifield in Chicago he met Hollifield in Dayton, Ohio, and gave him $200.00 (R. 323-324).

Over petitioner's objections (R. 326), upon the same grounds noted above, there was admitted in evidence against petitioner a written statement signed by petitioner (Govt. Ex. 41, R. 326, RE 101) in which petitioner, among other things, admitted paying $1200.00 to Hollifield.

There were also admitted in evidence (R. 264-265, 289) against the co-defendant Hollifield two signed confessions (Govt. Ex. 37, R. 266, RE 97-98; and Govt. Ex. 38, R. 290, RE 99-100). There was also admitted and read into the record, against the co-defendant Hollifield, his grand jury testimony (R. 299-317) as well as testimony concerning oral statements made by him (R. 208, 255-278, 282-295), most of which contained admissions of an incriminating nature.

Neither the signed confessions, the grand jury testimony, nor the oral incriminating statements of the co-defendant Hollifield were admitted against petitioner, and the court admonished (R. 260, 268) and instructed (R. 721-722) the jury that such evidence might be considered against Hollifield alone and could not be considered against petitioner.

At the close of the Government's evidence petitioner moved, unsuccessfully, to strike from the record the written statement signed by him (Govt. Ex. 41, R. 326, RE 101; R. 325-326) and the testimony concerning oral statements allegedly made by him upon the gounds that, in the absence of his oral and written admissions, there was in the record no evidence whatsoever, competent as to him, concerning

the payment of money to Hollifield or of an agreement so to pay money (R. 519, 549). At the same time petitioner moved, unsuccessfully, for judgment of acquittal upon the same grounds (R. 16, 17, 550, 554). At the close of all the evidence, petitioner's motions were renewed and again overruled (R. 674).

Petitioner, on June 16, 1952, was sentenced to imprisonment for a period of two years on Count 1; one year on Count 4, the sentence on Count 4 to run consecutively with the sentence on Count 1; one year and one day on Count 5, the sentence on Count 5 to run concurrently with the sentences on Counts 1 and 4; and to pay a fine of $500.00 on Count 2 and $500.00 on Count 3 (R. 29).

The judgment of the court below reversed the judgment of the trial court as to Counts 2 and 3 of the indictment, on the ground that the only evidence connecting petitioner with the offenses therein charged was in Hollifield's statements, which were inadmissible against him. But it affirmed the judgment as to the remaining counts and remanded the case to the District Court for resentencing. (R. 765-772.)

This Court granted certiorari (R. 775), limited to the questions set out at p. 2, *supra*.

SUMMARY OF ARGUMENT

1. *Warszower* v. *United States*, 312 U. S. 342, holds that admissions made prior to the time of the alleged crime need not be corroborated, because such admissions "contain none of the inherent weaknesses of confessions or admissions after the fact." Thus the rationale of that case undercuts the ruling below, which held that petitioner's after-the-fact admissions did not require corroboration. And other decisions here analogize confessions and admissions after the fact where, as in this case, such admissions are used to supply proof of essential elements of the offenses charged. On reason and authority both, therefore, an after-the-fact admission stands on the same footing as

a confession with respect to the need for corroboration, particularly when, as in the case at bar, there would be no proof of the commission of the crime without such admission.

2.A. The quantum of the corroborative proof that is necessary has never been indicated in any decision of this Court. In the lower federal courts, one line of decisions holds that it is sufficient if the corroborating proof fortifies the truth of the confession, and if it together with the confession or admission establishes the commission of the crime. The prevalence of forced confessions led to another and stricter rule, which requires independent proof of substantial evidence touching and tending to prove each of the main elements or constituent parts of the *corpus delicti*. A third variant, which is usually an application of the strict rule, states that the corroborating evidence must prove that an offense was probably committed by someone. The cases are not always clear, and some circuits have ruled both ways on the issue; but at this time most circuits where the question has arisen apply the strict rule. Military decisions have moved from the loose to the strict rule, and the Court of Military Appeals has squarely held that the entire *corpus delicti*, including the *scienter*, must be proved independently of what the accused said or wrote.

B. In this case, the *corpus delicti* as to the substantive counts is the payment of money or an agreement to pay money for services rendered or to be rendered; and as to the conspiracy count the *corpus delicti* is the agreement. Apart from what petitioner and his co-defendant said—and the latter is concededly inadmissible against petitioner—this record contains no proof of the *corpus delicti* of the offenses as to which petitioner's conviction was affirmed.

C. The adoption of the strict rule of corroboration resulted from judicial experience with improperly obtained confessions—and such confessions are still prevalent, as

this Court's reports show. There is therefore every reason to adopt the strict rule of corroboration, in order to discourage the obtaining of confessions and after-the-fact admissions by improper means, thus forcing law enforcement officials to concentrate on securing evidence of crime independent of any statements made to them by accused persons. Surely this Court should not adopt for criminal trials in federal district courts a standard that affords a defendant less protection than is accorded to an accused before a court-martial.

3. Despite repeated admonitions and instructions to the jury by the trial judge that Hollifield's statements were inadmissible against petitioner, the jury convicted petitioner on Counts 2 and 3; and the trial judge denied motions for acquittal and for a new trial and imposed sentence thereon—although, as the court below held, setting aside petitioner's conviction on those counts, only Hollifield's statements connected petitioner with them. But, in sustaining petitioner's conviction on the other counts, as to which there was no independent proof apart from his own admissions, the court below may yet have been influenced by what Hollifield said.

The risk that particular defendants will be prejudiced in fact by declarations which are inadmissible against them in point of law is perhaps inherent in prosecutions for conspiracy; but that danger can be minimized by requiring that the declarations of any co-defendant must be corroborated by independent evidence of the *corpus delicti* in order to be admissible. Thus the emphasis would shift to trustworthy independent evidence.

Accordingly, adoption of the strict rule for corroborating confessions and after-the-fact admissions would not only discourage the obtaining of improper confessions, it would also minimize the dangers now inevitable in prosecutions for conspiracy.

ARGUMENT

Under the order entered at the close of the last Term (J. Sup. Ct., Oct. T. 1953, p. 245; R. 775), this case is assigned for argument following the four causes that involve convictions for income-tax evasion by use of the so-called "net worth" theory. *Friedberg* v. *United States*, No. 18; *United States* v. *Calderon*, No. 25; *Holland* v. *United States*, No. 37; *Smith* v. *United States*, No. 52 (No. 726, Oct. T. 1953).

But the present case presents more fundamental problems of evidence and of criminal law than do those others. Whether the "net worth" theory can ever be a proper mode of proving income-tax evasion, or whether its use improperly shifts the burden of proof to a defendant in such cases (compare *United States* v. *Johnson*, 319 U. S. 503, 517, with e. g., *Demetree* v. *United States*, 207 F. 2d 892 (C.A. 5); *United States* v. *Caserta*, 199 F. 2d 905 (C.A. 3); and *United States* v. *Fenwick*, 177 F. 2d 488 (C.A. 7)), does not control decision here, and any determination made adversely to *Friedberg*, *Calderon*, *Holland*, and *Smith* on that issue would not require affirmance of the present conviction.

True, if it were held in *Calderon* and *Smith* that the admissions there involved would be admissible only if fully corroborated by independent evidence, then that holding would benefit this petitioner; but the converse does not follow, as the present case is distinguishable from all of the others raising the admissions point.

Thus, in *Calderon*, where the issue is whether the defendant's admission as to the amount of cash which he had on hand at the starting point of the computation was held insufficient to support the conviction in the absence of independent proof of that fact (see opinion below in that case, 207 F. 2d 377, 378), the Government said in its Petition for Certiorari (No. 577, Oct. T. 1953, Pet. 7), "The amount of cash on hand is not in itself either the *corpus delicti* or an essential element of the offense of willful tax evasion." Here, on the other hand, as we point out below,

pp. 24-28, petitioner's admissions supply essential elements of the offenses of which he stands convicted, and supply the only proof in this record of the *corpus delicti* thereof.

Similarly, in *Goldbaum* v. *United States*, No. 12—which is one of the three "net worth" cases restored to the docket on the last day of the 1953 Term after a denial of certiorari earlier in that Term (347 U. S. 1007)—it was pointed out by the Government that the admissions involved in that case were made before the date of the offense there in question, and were moreover not made to law enforcement officers (Br. Op. 19-20, No. 164, Oct. T. 1953). Here, on the other hand (*infra*, pp. 11-12), the admissions on which petitioner's conviction rests were made to F.B.I. agents after the date of the acts charged against him.

Rulings unfavorable to the defendants on the admissions point in the "net worth" cases would therefore not require affirmance here.

I. WHERE AN ADMISSION IS MADE TO LAW ENFORCEMENT OFFICERS AFTER THE DATE OF THE ACTS CHARGED AS CRIMES, IT MUST BE TREATED AS A CONFESSION, AND ACCORDINGLY IT IS INADMISSIBLE UNLESS CORROBORATED.

The starting point under this heading is *Warszower* v. *United States*, 312 U. S. 342, where this Court held squarely that admissions made prior to the time of the alleged crime need not be corroborated.

In the present case, all of petitioner's admissions were made after the fact. The dates alleged in the indictment that have reference to 'im run from October 1, 1950, to September 26, 1951 (R. 2, 3, 4-5, 6). His written admission (Govt. Ex. 41, R. 326, RE 101-102; R. 329-331, 769-771) is dated October 16, 1951. And all of his oral admissions (R. 320-325, 332-333, 337-351) were made to two F.B.I. agents who interrogated him in October, 1951 (R. 318, 337-338, 348).

The circumstances surrounding the making of the admissions are clearly set forth in the record. Petitioner was

requested to come to the Chicago office of the F.B.I. and he was there interrogated by Agent Regan and Agent Donaldson. He was told that the agents were interested in discussing with him any transactions that he may have had with Hollifield and that "it was possible that in discussing these transactions that he could involve himself in something and that he should be aware of that." (R. 318, 319.) Agent Regan further testified, "I asked Mr. Opper if Mr. Hollifield had ever solicited or asked for funds, money of any kind. Mr. Opper said 'That is a difficult question to answer. Is there any difference between giving money and loaning money?' I then asked Mr. Opper if he had given money to Robert Hollifield for any purposes whatsoever" (R. 321). At a subsequent interrogation in the same place, attended by Agents Regan and Donaldson, petitioner made the oral admissions (R. 322-324) that were admitted in evidence against him and, at Agent Regan's request (R. 324), later delivered to him the written statement in which he admitted having paid $1,200.00 to Hollifield (Govt. Ex. 41, R. 326, RE 101-102; R. 325).

The court below held (R. 771) that these admissions did not require corroboration.

We submit that this holding, far from being required by *Warszower*, is diametrically opposed to the rationale of that decision. This Court there said (312 U. S. at 347),

> The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact.

In other words, this Court in *Warszower* treated admissions after the fact on the same footing as confessions

with respect to the need for corroboration because of the "inherent weaknesses" of both.

It is interesting to note that in the *Warszower* case the identity between confessions and admissions after the fact in the foregoing connection was urged on the Court by the Government. The United States said on that occasion (U.S. Br., No. 338, Oct. T. 1940, pp. 21-22):

> It is the Government's contention that independent evidence is required only in the case of confessions, *and of admissions made after the event and in the context of conversations, interviews, and proceedings relating to the offense itself. The theory of this position squares with the purpose of the rule requiring corroboration.* For the object of that rule, in the words of the Circuit Court of Appeals in the instant case, is "protection against the risks of an untrue confession, coerced or psychopathic" [133 F. 2d at 100]. The declarations by the petitioner, relied upon by the Government, were made on occasions long before the date of the offenses alleged and in connection with proceedings wholly unrelated to those which formed the basis of this indictment. They were made under circumstances which give no cause for anxiety that they were involuntary or psychopathic. [Italics added.]

And, as we indicated in our Petition (p. 18), two circuits have applied the corroboration rule to admissions after the fact. *Calderon* v. *United States*, 207 F. 2d 377 (C.A. 9), now pending on certiorari, No. 25;[5] *Pines* v. *United States*, 123 F. 2d 825 (C.C.A. 8); *Gulotta* v. *United States*, 113 F. 2d 683 (C.C.A. 8);[6] compare *United States* v. *Golan*, 24 F. Supp. 523 (E.D. Pa.; Maris, Circ. J.).

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[5] There, however, as we have noted (*supra*, pp. 11-12), the admission, unlike the one here in issue, covered neither the *corpus delicti*, nor an essential element of the offense.

[6] "* * * there is no sound reason why an uncorroborated voluntary admission of some element of crime should be given greater force as evidence of guilt than is accorded the accused's outright confession of the crime itself." 113 F. 2d at 686.

But the rule for which petitioner contends here does not rest either on a counting of circuits or the scoring of debating points on the basis of what former law officers of the Government said in years past. It is the cases decided by this Court that support the treatment of admissions after the fact on the same footing as confessions.

Thus, in *Wilson* v. *United States*, 162 U. S. 613, 621-622, this Court said:

> Although his answers to the questions did not constitute a confession of guilt, *yet he thereby made disclosures which furnished the basis of attack*, and whose admissibility may properly be passed on in the light of the rules applicable to confessions. Of course, all verbal admissions must be received with caution, though free, deliberate and voluntary confessions of guilt are entitled to great weight. [Italics added.]

Similarly, in *Bram* v. *United States*, 168 U. S. 532, the Court said (pp. 541, 542):

> "The rule [against involuntary statements] excludes not only direct confessions, but *any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess.*" [Italics added.]
>
> * * * * *
>
> The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then after procuring its admission claiming that it did not tend to prove guilt, and could not, therefore, have been prejudicial, has been well stated by the Supreme Court of North Carolina, *State* v. *Rorie* (1876) 74 N. C. 148:
>
> > "But the State says this was a denial of guilt and not a confession. It was a declaration which the State used to procure a conviction; and it is not for the State to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner's statement precludes the State from saying that it was not used to his prejudice." (p. 151.)

The foregoing completely disposes of the distinction sought to be drawn by the Government in this case (Br. Op. 14-15), between inculpatory and exculpatory statements. That distinction smacks of artificiality, recalling the now largely abandoned distinctions between intrinsic and extrinsic fraud. Cf. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238; *Knauer* v. *United States*, 328 U. S. 654. As the *Wilson* and *Bram* cases indicate, the test of the statement is the use sought to be made of it; and where, as in this case, an admission is used to supply proof—the sole proof—of essential elements of the offense charged, then it stands on the same footing as an outright admission of guilt. After all, without the admission there could and would be no proof of guilt. Even Wigmore recognized this; see 3 Wigmore, *Evidence* (3d ed. 1940) § 821, p. 238: "A confession is *an acknowledgment in express words*, by the accused in a criminal case, *of the truth of the guilty fact charged* or *of some essential part of* it." [Italics in original.] (We say, "Even Wigmore", because of the late Dean's view that there should be no definite rule forbidding conviction of an accused in a criminal case upon his uncorroborated confession. See 7 *id.*, §§ 2070-2071.)

See also *Ballew* v. *United States*, 160 U. S. 187, 193, where the Court held that a particular statement was neither "a confession or in the nature of a confession" because "It had no tendency to establish his guilt or to operate to his prejudice."

Finally, this Court has held that, where statements are obtained by law enforcement officers from persons unlawfully detained, such statements are inadmissible in a federal court regardless of their nature That rule, first applied to confessions in *Anderson* v. *United States*, 318 U. S. 350, was similarly applied to admissions in *McNabb* v. *United States*, 318 U. S. 332. We do not contend for a moment that the present petitioner was unlawfully detained; we cite the *Anderson* and *McNabb* cases simply to show that, in the view of this Court, the distinction which the Govern-

ment now (Br. Op. 14) seeks to establish between admissions after-the-fact and confessions is without foundation in law.

We assert with confidence, therefore, that the decisions of this Court support the rule for which petitioner contends and which the Government urged in *Warszower*, namely, that independent corroborating evidence is required, not only in the case of confessions, but also in the case of "admissions made after the event and in the context of conversations, interviews, and proceedings relating to the offense itself." Petitioner's admissions here (Govt. Ex. 41, R. 326, RE 101-102; R. 320-325, 329-333, 337-351, 769-771) were plainly of that nature.

Consequently, unless those admissions were properly corroborated by independent evidence, they were inadmissible, and petitioner's motion to strike them from the record (R. 519, 549) should have been granted.

We turn, therefore, to the next issue, namely, what is the scope and nature of the corroborating testimony prerequisite for the introduction of confessions and admissions after the fact.[7]

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[7] We do not pause to analyze the state decisions relied on by the Court below (R. 771) for the proposition that exculpatory statements denying guilt are not confessions (*State* v. *Gilman*, 51 Me. 206, 225; *State* v. *Cadotte*, 17 Mont. 315; *State* v. *Novak*, 109 Iowa 717; *People* v. *Kristy*, 111 Cal. App. 2d 695; *Bruner* v. *People*, 113 Colo. 194; *People* v. *Porter*, 269 Mich. 284). Not only are those rulings not controlling here, but none considers the present question whether admissions in the nature of exculpatory statements but still admitting some essential part of the offense charged require corroboration.

II. A CONVICTION CANNOT BE SUSTAINED WHERE, AS HERE, THERE IS NO PROOF OF THE CORPUS DELICTI AND NO PROOF THAT ANY CRIME WAS COMMITTED BY ANYONE, INDEPENDENT OF AN ADMISSION MADE TO LAW ENFORCEMENT OFFICERS BY THE PETITIONER AFTER THE DATE OF THE ACTS CHARGED AS CRIMES.

The basic infirmity in the ruling below lies in its affirmance of petitioner's conviction on his after-the-fact admission, without any independent proof whatever of the *corpus delicti*, and without any independent proof that the crimes charged were committed by anyone.

Under the allegations of the substantive counts, 1-4 inclusive (R. 1-6), the elements of the *corpus delicti* are (a) the payment of money or an agreement to pay money to Hollifield for (b) services rendered or to be rendered by Hollifield to the petitioner; and in Count 5 (R. 6-10), the conspiracy count, the *corpus delicti* is of course the agreement. Cf. R. 544-549.

Eliminating what Hollifield said, for that, admittedly (R. 769), cannot be considered against the petitioner—eliminating what petitioner himself said, because the inquiry under the present heading is whether that was sufficiently corroborated to be admissible—there is in this record, as we point out presently in greater detail, neither evidence of payment nor evidence of an agreement to pay.

Otherwise stated, there is in the record in this case no proof of the *corpus delicti*, and no proof of the commission of any crime, apart from the statements of the two defendants. And so we turn to consider whether and to what extent extra-confessional proof of the *corpus delicti* is required—and we say "extra-confessional" in view of the rule discussed above, pp. 11-16, which analogizes admissions after the fact to confessions for this purpose.

A. The lower federal courts now tend to require extra-confessional proof of the corpus delicti in order to render admissible a confession or an after-the-fact admission.

This Court has hardly spoken on the present question.[8] There is some recognition in *Isaacs* v. *United States*, 159 U. S. 487, of the rule for which petitioner contends, but hardly a square holding, besides which there was in that case (159 U. S. at 490) "abundant evidence in the case outside of defendant's confession, not only that the man had been murdered, but considerable evidence that he was a white man". And in *Perovich* v. *United States*, 205 U. S. 86, 91, relied upon by the court below (R. 769), the holding was that an admission was competent when the *corpus delicti* was independently proved, not that an admission can by itself supply proof of the *corpus delicti*.

There has actually never been a holding in this Court as to the quantity or degree of extra-confessional proof of the *corpus delicti* that is required.

In the lower federal courts, it has hardly been doubted that some corroboration of a confession is necessary, and in the earlier cases the requirement ranged from "corroborative evidence tending to prove the facts embraced in the confession" (*United States* v. *Williams*, 1 Cliff. 5, 28, Fed. Case No. 16,707, 28 Fed. Cas. at 645, *per* Clifford, Circuit Justice; *Daeche* v. *United States*, 250 Fed. 566, 571 (C.C.A. 2)), to a square holding that the evidence of the *corpus delicti* "must be other than things said and done by the defendant" (*Naftzger* v. *United States*, 200 Fed. 494, 499 (C.C.A. 8)).

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[8] In *United States* v. *Wood*, 14 Pet. 430, the issue was whether a signed statement by the defendant, in the absence of a live witness against him, was sufficient to prove the *corpus delicti* in a perjury case; held yes. In *St. Clair* v. *United States*, 154 U.S. 134, it was held that the *corpus delicti* in a case of homicide on the high seas was sufficiently proved by evidence of the victim's disappearance, and that it was not necessary to produce the victim's body.

The *Daeche* case, where L. Hand, D.J. (as he then was), spoke for the Second Circuit, was decided in 1918. Its holding (250 Fed. at 571) that "any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession", and that "Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of truth", was followed in other circuits, one suspects rather more because of the eminence of the writer than in consequence of any independent analysis of the problem. E. g., *Pearlman* v. *United States*, 10 F. 2d 460 (C.C.A. 9); *Wynkoop* v. *United States*, 22 F. 2d 799 (C.C.A. 9); *Jordan* v. *United States*, 60 F. 2d 4 (C.C.A. 4), certiorari denied, 287 U. S. 633.

Not until *Forte* v. *United States*, 94 F. 2d 236 (App. D. C.), was the rule reexamined, and then the *Daeche* doctrine was rejected; the court held that the prosecution must, independent of the confession, prove the *corpus delicti*, including the *scienter*, by substantial evidence. Only the accused's connection with the crime may be shown by the confession alone. This has since remained the rule in the District of Columbia (see *George* v. *United States*, 125 F. 2d 559; *Ercoli* v. *United States*, 131 F. 2d 354; *Sesso* v. *United States*, 133 F. 2d 381).

The basis for the change from *Daeche* to *Forte* in the nineteen years that separated them was what had been learned in the interim, *viz.*, that the practice of forcing confessions was widespread in the United States; in this connection, the court in *Forte* cited the Report on Lawlessness in Law Enforcement of the National Commission on Law Observance and Enforcement; Yankwich *The Lawless Enforcement of the Law* (1935) 9 So. Calif. L. Rev. 14; and Note, *The Third Degree* (1930) 45 Harv. L. Rev. 617. The court said (94 F. 2d at 240):

> The question presented is of first impression here; and we feel bound upon a subject touching so materially liberty, and in many cases life itself, and especially

> in the criminal law where justice requires equality of treatment in respect of trial procedure and proof, to give weight to the findings of the National Commission, and to follow in adopting a rule for this jurisdiction the rule of the great majority of the courts of the United States—that there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the *corpus delicti* and the whole thereof. We do not rule that such corroborating evidence must, independent of the confession, establish the *corpus delicti* beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the *corpus delicti* and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith.

Thus the rule of the *Forte* case exemplifies Holmes' timeless apothegm (*The Common Law*, 1) that "The life of the law has not been logic: it has been experience." And so the *Forte* rule has been followed in other circuits. See *Oldstein* v. *United States*, 99 F. 2d 305 (C.C.A. 10); *Ryan* v. *United States*, 99 F. 2d 864, 869 (C.C.A. 8), certiorari denied, 306 U. S. 635; *Evans* v. *United States*, 122 F. 2d 461 (C.C.A. 10), certiorari denied, 314 U. S. 698; *Pines* v. *United States*, 123 F. 2d 825 (C.C.A. 8); *United States* v. *Fenwick*, 177 F. 2d 488 (C.A. 7); *Calderon* v. *United States*, 207 F. 2d 377 (C.A. 9), pending on certiorari, No. 25, this Term; *United States* v. *Golan*, 24 F. Supp. 523 (E.D. Pa.; Maris, Circ. J.); cf. *Yost* v. *United States*, 157 F. 2d 147 (C.C.A. 4); and see an earlier case *accord*, *Tingle* v. *United States*, 38 F. 2d 573 (C.C.A. 8).

A third possibility, midway between *Daeche* and *Forte*, or at least verbally between them, is the rule that the independent evidence must show that a crime was committed

by someone. This rule is found set forth both in cases that appear to follow *Daeche* as well as in cases that purport to follow *Forte*. See *Anderson* v. *United States*, 124 F. 2d 58 (C.C.A. 6), reversed on other grounds, 318 U. S. 350; *United States* v. *Di Orio*, 150 F. 2d 938 (C.C.A. 3), certiorari denied, 326 U. S. 771; *Vogt* v. *United States*, 156 F. 2d 308 (C.C.A. 5); *Spriggs* v. *United States*, 198 F. 2d 782 (C.A. 9); *Foster* v. *United States*, 212 F. 2d 249 (App. D.C.); cf. *Adolfson* v. *United States*, 159 F. 2d 883 (C.C.A. 9), certiorari denied, 331 U. S. 818. Indeed, the Second Circuit, which as late as 1940 expressly followed *Daeche* and rejected *Forte* (*United States* v. *Warszower*, 113 F. 2d 100, 102, affirmed on other grounds, 312 U. S. 342), now uses a formula consistent with the intermediate rule. See *United States* v. *Markman*, 193 F. 2d 574, 576:

> Whatever may be the rule elsewhere, we have held that the extra-confessional proof required need not itself preponderantly establish the guilt of the defendant; if it shows by independent facts *that the crime has been committed* against which the jury can measure the reliability and consistency of a defendant's own statements, this is enough. [Italics added.]

We say, "verbally between them", because as the *Forte* rule is applied, the requirement that there be independent proof of the *corpus delicti* is no different from a requirement that there be independent proof that a crime has been committed by someone; the *Forte* rule does not require independent proof that the defendant himself committed the crime.[9] The vital distinction between the *Daeche* and

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[9] As restated in *Ercoli* v. *United States*, 131 F. 2d 354, 356-357 (App. D. C.), the *Forte* rule is as follows:

> "* * * (1) there can be no conviction of an accused person in a criminal case upon an uncorroborated extra-judicial confession; (2) such corroboration is not sufficient if it tends merely to support the confession without also embracing substantial evidence touching and tending to prove each of the main elements or constituent parts of the corpus delicti; (3) however, such corroborating evidence need not, independent of

Forte rules lies in this, that *Forte* insists on extra-confessional proof that a crime has been committed, while *Daeche* is satisfied if that fact is shown by the independent proof plus the confession or admission. On that critical issue, the decisions are not very illuminating; often the facts are such that the test of neither rule is satisfied (e.g., *Tabor* v. *United States*, 152 F. 2d 254 (C.C.A. 4)); and on occasion, as in *United States* v. *Markman*, 193 F. 2d 574 (C.A. 2), *supra*, the court that first originated and then adhered to the *Daeche* rule puts the requirement in terms consistent only with *Forte*. See the quotation, *supra*, p. 21.[10]

In considering the state of the law of evidence administered by the federal courts in criminal cases, it may not be amiss to examine developments in military law, where, by express command of Congress since 1949, the procedure and rules of evidence and of substantive law are prescribed by the President, by regulations, "which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts". Article

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the confession, establish the corpus delicti beyond a reasonable doubt; (4) if there is substantial evidence of the corpus delicti, independent of the confession, and the two, together, are convincing beyond a reasonable doubt of the defendant's guilt, that is sufficient."

See also, to the same effect, *George* v. *United States*, 125 F. 2d 559, 563 (App. D. C.).

[10] A similar intra-circuit inconsistency appears in the Ninth Circuit. Compare *Davena* v. *United States*, 198 F. 2d 230, certiorari denied, 344 U.S. 878, with *Pon Wing Quong* v. *United States*, 111 F. 2d 751, 756, *Spriggs* v. *United States*, 198 F. 2d 782, and *Calderon* v. *United States*, 207 F. 2d 377, pending on certiorari, No. 25. In view of the last two rulings, however, the Ninth Circuit must now be considered as being in the *Forte* column.

In the Fourth Circuit, *Bell* v. *United States*, 185 F. 2d 302, certiorari denied, 340 U.S. 930, leans toward *Daeche* though citing *Forte*; *Yost* v. *United States*, 157 F. 2d 147, leans strongly in the direction of *Forte*; while in *Tabor* v. *United States*, 152 F. 2d 254, the court held that the facts satisfied neither rule and hence did not undertake to resolve the differences between them.

36(a), Uniform Code of Military Justice (50 U.S.C. § 611(a)).[11]

In the 1921 edition of the Army's *Manual for Courts-Martial*, the rule of corroboration was stated in these terms (par. 225(c), pp. 188-189):

> It is not requisite that this outside evidence constituting proof of the corpus delicti shall be sufficient to convince the court beyond a reasonable doubt of the guilt of the accused, nor need it cover every element contained in the charge.

But thirty years later, the *Manual* prescribed for all of the armed forces stated (MCM, US, 1951, ¶140a at p. 251):

> A court may not consider the confession or admission of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone.

The latter rule was accordingly applied by the Court of Military Appeals in *United States* v. *Isenberg*, 2 USCMA 349, 8 CMR 149, after it had noted that the earlier military precedents "embrace the Daeche rule while the later ones seem more consistent with the Forte principles" (2 USCMA at 352, 8 CMR at 152). Since there was no independent proof of *scienter*, the *Isenberg* conviction was reversed.[12]

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[11] Article of War 38, as amended effective February 1, 1949 (10 U. S. C. [Supp. II to 1946 ed.] § 1509) was identical in substance, with only minor verbal variations. So far as the rules of evidence alone are concerned, they have been prescribed by the President since 1916. Article of War 38 of 1916, 39 Stat. 650, 656; Article of War 38 of 1920 (10 U.S.C. [1946 ed.] § 1509).

[12] Inasmuch as the U. S. Court of Military Appeals disposes of some 2000 criminal cases in every calendar year, about 63% of which involve criminal offenses not of a peculiarly military nature, we feel no hesitation in citing its rulings on any point not foreclosed by decisions of this Court.

9. There is no such independent proof in this record. Nor is there in the present record, any independent evidence "of the body or fact of the wrong and the criminal means (not identity) by which it came about" (*George* v. *United States*, 125 F. 2d 559, 563 (App. D. C.); that is to say, there is no independent evidence that there was a payment of money or an agreement to pay money to Hollifield.

Neither is the extra-confessional proof in the instant case sufficient to satisfy the present rule of the Second Circuit, there being no independent evidence "that the crime has been committed", (*United States* v. *Markman*, 193 F. 2d 574, 576), that is to say, that there was a payment of money or an agreement to pay money to Hollifield.

Thus the *corpus delicti* as to petitioner has not been independently established in any degree.

C. This Court should adopt the strict rule, which requires independent proof of the corpus delicti, for the same reason which caused that rule to be first formulated, viz., the danger of improper confessions and admissions.

Since, as has been shown, this Court is not foreclosed by its own rulings on the issue now presented, it is free to adopt whatever rule appears most desirable in the light of the events that have transpired since a divergence first appeared in the circuits.

Just as the shift from *Daeche* to *Forte* reflected the intervening experiences with improperly obtained confessions, so the years since *Forte* have emphasized the soundness of the departure there made, and have shown that the danger that what an accused has said may not be trustworthy is a real one. It is not necessary to look to totalitarian nations for examples of coerced confessions, of forced admissions, or of the psychological torture that is now popularly known as brainwashing. Alas, these manifestations are prevalent in this country also, nor is it necessary to look beyond the otherwise staid pages of the United States Reports. We cite some representative deci-

sions in the margin.[16] The trend in erforcement methods from *Wan* v. *United States*, 266 U. S. 1, and *Bob White* v. *Texas*, 310 U. S. 530, to *Leyra* v. *Denno*, 347 U. S. 556, may reflect a refinement in the technique of obtaining statements from an accused, but assuredly it shows that the basic evil is still very much present. We have learned, too, that confessions are frequently psychologically unreliable, even where no improper pressures are exerted. See McCormick, *Some Problems and Developments in the Admissibility of Confessions* (1946) 24 Tex. L. Rev. 239, 239-241.

There is, accordingly, every reason for this Court to adopt a rule which requires, as a prerequisite to the admissibility of confessions or after-the-fact admissions, the introduction of independent and substantial evidence touching and tending to prove each of the constituent parts of the *corpus delicti*. Otherwise stated, there must be in the record proof tending to show that a crime was committed by some one before any statements made by the defendant after the acts charged against him have been committed become admissible.

With such a rule in effect, the obtaining of confessions and after-the-fact admissions by improper means will be substantially discouraged, and law enforcement officers will of necessity be forced to concentrate on obtaining evidence of criminality independent of any statements made to them by the person they accuse of crime. We submit that the obvious desirability of such a rule far outweighs the risk of an occasional reversal for insufficiency of proof. Certainly the existence of the *Forte* rule has not hamstrung the administration of criminal justice in the District of Columbia. And surely petitioner is not appealing to sentimentality or to libertarianism in contending for the adoption in criminal cases tried in United States district courts

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[16] E.g., *Ward* v. *Texas*, 316 U. S. 547; *Anderson* v. *United States*, 318 U. S. 350; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Malinski* v. *New York*, 324 U. S. 401; *Lee* v. *Mississippi*, 332 U. S. 742; *Watts* v. *Indiana*, 338 U.S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68.

B. Apart from petitioner's after-the-fact admissions, there is in this record no proof of the corpus delicti and no proof that a crime was committed by anyone.

As before noted, *supra*, p. 17, the *corpus delicti* as to the substantive counts is the payment of money or an agreement to pay money to Hollifield for services rendered or to be rendered by him to the petitioner; and as to the conspiracy count the *corpus delicti* is the agreement.[13]

In this record, there is no evidence independent of Hollifield's statements (which are of course inadmissible against petitioner) or independent of petitioner's after-the-fact admissions that proves the existence of the *corpus delicti* or that shows that an offense was committed by anyone.

1. The court below in summarizing the evidence stated in its opinion (R. 767-768) that petitioner, a sub-contractor on various projects for the equipping of survival kits, submitted to two prime contractors compasses and goggles for the kits; that certain goggles which had been supplied by petitioner to a prime contractor had been recommended for rejection by the Chief, Physiology Branch, Aero Medical Laboratory, on January 23, 1951, because of "marked deviations" from the applicable specifications; that petitioner's co-defendant, Hollifield, was employed by the United States Air Force at Wright Field, Dayton, Ohio, being a designer supervisor (aviation clothing and equipage); that he worked in this position under the Chief, Medical Specifications Branch, with opportunity for "wide use of creative, initiative and independent judgment in placing and supervising the accomplishment of land survival equipment"; that his duty was to review and discuss first samples produced "to determine compliance with specifications"; that as project supervisor of survival kits, it was Hollifield's duty to pass upon the conformity to specifications of the various items in the kit, including

[13] For a case discussing the elements of a *corpus delicti* in income tax evasion cases, see *Potson* v. *United States*, 171 F. 2d 495 (C.A. 7).

goggles; that shortly after the recommended rejection Hollifield secured a conference with Lieut. Moss, a project engineer of the Physiology Branch, and other employees of the Air Force; that petitioner attended this conference and in his presence Hollifield argued that the goggles be accepted; that at the conference it was concluded that Hollifield should embody his reasons for recommending acceptance in a routing and record sheet and this was done; that the routing and record sheet stated: "Confirming conversation between Messrs. F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialties Branch, it would be appreciated if your office would reconsider the use of the goggles submitted to determine their conformity with subject item, in view of the following information"; that while the routing and record sheet was signed by Randall W. Briggs, it bore the initials of Hollifield and, in asking for reconsideration, stated substantially the reasons Hollifield had advanced at the oral conference above described as to why the rejection of the goggles should be changed; that reconsideration was granted and the use of the substitute goggles submitted by appellant was recommended on February 3, 1951.

Petitioner acknowledges that the evidence summarized immediately above was adduced from sources independent of petitioner's admissions. But petitioner submits that none of such evidence establishes or could give rise to a reasonable inference that anyone, petitioner included, paid or agreed to pay money to Hollifield—and, as stated, it is the payment or agreement to pay that constitutes the *corpus delicti* in this case.

2. The court below, in its summary of the evidence (R. 767) further stated that petitioner "had been acquainted with Hollifield for several months, having met him in October, 1950, and having seen him some 15 times during the period involved."

In fact, however, there is no independent evidence that petitioner saw Hollifield some fifteen times during the period involved. The sole source of this statement is the testimony of Special Agent Regan, of the F.B.I., who testified (R. 322) that petitioner orally admitted to him that he met Hollifield on approximately fifteen occasions. The only independent evidence in this record is that, on a single occasion (January 23 or 24, 1951), petitioner attended a meeting at Wright Field, at which meeting there were present Hollifield, Norris N. Murray, O. T. Strand, and F. Moss (the latter three being officers at Wright Field) and a sixth man whose identity was not disclosed (R. 377-378).

3. The court below in its summary of the evidence (R. 767), referring to the rejection of certain goggles supplied by petitioner, recited further: "Hollifield as admitted by appellant, had discussed this matter with appellant." There is in the record of the case no independent evidence of any such discussion.

4. In addition to the evidence thus summarized by the court below, there were but three items of independent evidence, which might be said to relate remotely, if at all, to the payment of money, *viz.*,

a. That on April 14, 1951, Hollifield went to the City of Chicago (R. 334, 420-423);

b. That on April 13, 1951, a telephone call was made from the Hollifield residence in Dayton, Ohio, to the Opper residence in Chicago (R. 414-415, 417); and

c. That a check for $1000.00 was drawn by Opper on April 13, 1951, and was cashed by Opper on April 16, 1951 (R. 333-336, 425-427; Govt. Ex. 42, R. 333, RE 103).

But, (a) there is no independent evidence that Hollifield met or communicated with Opper while in Chicago;

(b) There is no independent evidence as to who, if anyone, conversed, or whether the conversation related to business or social matters; and,

(c) There is nothing on that check and no independent evidence to identify it with Hollifield; and, moreover, Opper's bank ledger sheets (Govt. Ex. 43, R. 337, RE 104-106) demonstrate that within two and one-half months of April 16, 1951, Opper cashed fifteen other checks amounting to or exceeding $1000.00.[14]

It is significant in this connection that the Government in its recital of the independent evidence (Br. Op. 15) states that the items selected "all tend in general to corroborate petitioner's admissions of payment."[15] Those items would satisfy the *Daeche* rule, but when the Government goes on to suggest "that the independent facts detailed above suggest the existence of a corrupt agreement between petitioner and Hollifield and the transfer of money sufficiently to satisfy the rule adopted in *Forte* v. *United States* * * *, since it is established that the independent proof of the *corpus delicti* need not in itself be sufficient to establish the crime" (Br. Op. 15-16), it badly misreads *Forte* and the cases interpreting that decision. Of course there is no need to prove independently of the confession the agency of the accused as a criminal, but there must be, apart from what the accused said, "substantial evidence touching and tending to prove each of the main elements or constituent parts of the corpus delicti". *Ercoli* v. *United States*, 131 F. 2d 354, 356-357, quoted above, pp. 21-22, note

[14] The reference at R. 523, where petitioner's trial counsel is made to say, "a check for a thousand dollars *with* Hollifield's name on it", is an obvious typographical error; the word "with" should be "without". This is apparent from an inspection of the check itself, duly reproduced in facsimile in the record (Govt. Ex. 42, RE 103); it does not bear Hollifield's name.

[15] The Government speaks of "independent evidence of meetings between Hollifield and petitioner" (Br. Op. 15). This is error, for, as demonstrated above, pp. 25-26, there is independent evidence of only a single meeting between the two.

of a rule now adhered to before courts-martial, and in urging the rejection by this Court of a rule that has been advisedly abandoned by military tribunals.

Indeed, the adoption of the rule now contended for will not only strike a telling blow at improper and unlawful practices in the securing of confessions and of admissions after-the-fact, it will sensibly lessen an evil that has long concerned judges of this and other courts—the dangers inherent in prosecutions for conspiracy. To those we turn.

III. THIS CASE PRESENTS A GRAPHIC EXAMPLE OF THE ACTUAL IMPOSSIBILITY, IN CONSPIRACY PROSECUTIONS, OF LIMITING THE ADMISSIBILITY OF STATEMENTS MADE BY A CO-DEFENDANT.

Opinions in this Court, particularly in recent years, have several times reflected an awareness of the dangers implicit in prosecutions for conspiracy. See *Gebardi* v. *United States*, 287 U. S. 112, 122; *Kotteakos* v. *United States*, 328 U. S. 750, 776-777; *Von Moltke* v. *Gillies*, 332 U. S. 708, 721-722, 727-729; *Krulewitch* v. *United States*, 336 U. S. 440, 445-458; *Nye & Nissen* v. *United States*, 336 U. S. 613, 625-626.

We cannot add to the wealth of learning or to the sharpness of analysis therein set forth, nor do we propose to repeat parrot-like what members of this Court have already said on that subject. If the ornithological simile may with propriety be further pursued, we prefer, after the manner of the magpie, to appropriate what the labor of others has there conveniently assembled. Solely by way of emphasis, it may be desirable to quote from one of the authorities already cited (336 U. S. at 454, n. 21), an article by the then Chief of the Criminal Division of the United States Attorney's Office for the Eastern District of New York, O'Dougherty, *Prosecution and Defense under Conspiracy Indictments* (1940) 9 Brooklyn L. Rev. 263:

> The rules of evidence applicable to these cases offer the most cogent reason for the modern prosecutor to

> seek this particular count in his indictment. Where proof would normally be rejected under a substantive count, the more encompassing privileges under the conspiracy count permit its introduction where, otherwise, it could not be introduced. (p. 271.)
>
> Great latitude is therefore allowed in the admission of circumstantial evidence. (p. 273.)
>
> Persistent efforts are made by the modern prosecutor to secure the testimony of one conspirator, or aider, or abettor, as against the remaining defendants. (p. 273.)[17]

The fears voiced in the opinions of this Court just cited are shown by this record to have been well founded, and the accuracy of the observations made in the paper just quoted are dramatically demonstrated.

The trial judge repeatedly admonished the jury that the statements of the co-defendant Hollifield could not be used against petitioner (R. 260-261, 268-269, 290, 444, 722). Yet the jury was still so far confused as to find petitioner guilty on Counts 2 and 3 (R. 20), although, as the court below held (R. 772), the only evidence connecting petitioner with the payments alleged in those counts was the statement of Hollifield. And "the distinguished and experienced trial judge who heard the case" (R. 769) was himself also so confused that, despite the absence of competent evidence against petitioner on those counts, he denied a motion for judgment of acquittal thereon (R. 18, 19), overruled a motion for new trial (R. 27), and imposed sentence in respect of each of the invalid counts (R. 29).

Although the court below set aside the conviction on Counts 2 and 3 (R. 765, 772), it did rely, as we have already pointed out, *supra*, pp. 25-27, on matters which were not independently proved dehors the petitioner's admissions. And, significantly, as to both there was ample additional

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[17] The word "modern" in this context reminds ominously of what at the time of writing was in some circles considered the wave of the future.

evidence in Hollifield's statements to the F.B.I. and to the grand jury (numerous meetings with petitioner, R. 299-316 *passim*, and R. 322; discussion of specifications for goggles, R. 262-301; Govt. Ex. 37, R. 266, RE 97-98; Govt. Ex. 38, R. 290, RE 99-100). Assuredly, as we have shown (*supra*, pp. 24-28), petitioner's conviction on Counts 1, 4 and 5 has been affirmed without competent independent proof of the *corpus delicti*. And the statements of Hollifield, inadmissible against petitioner as a matter of law, may yet in point of fact have significantly contributed to that result.

It is commonplace in psychology that the ability of the human mind to compartmentalize and insulate particular bits of knowledge is limited. But where that inability has dire consequences to the liberty of an individual, where the mind's incapacity to apply fact A only to defendant X actually makes that inadmissible evidence seal the doom of defendant Y—or at least make a material contribution to that end—we pass from the realm of psychology to that of law.

At this juncture, what Mr. Justice Cardozo said for the Court in *Shepard* v. *United States*, 290 U. S. 96, 104, with reference to the use there made of the declaration of a deceased person not qualifying under the dying declaration exception, becomes relevant:

> It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

And because the admissible aspect of the declaration there involved "was a filament too fine to be disentangled by a jury" (290 U. S. at 106), the judgment was reversed.

Similarly, the present case is a virtual laboratory example of the operations of the rules of evidence in a conspiracy case, illustrating and illuminating the soundness of the strictures in the opinions cited *supra*, p. 30. We may agree with the Government (Br. Op. 16) that "the fact that error may occasionally occur in the operation of a rule does not mean that the rule is wrong." But in conspiracy cases, the errors occur constantly, and recur persistently; for reasons already canvassed, it could not be otherwise.

We do not ask, we could not properly ask, this Court by judicial fiat to declare a new rule of law in conspiracy cases that will limit such prosecutions beyond any point as yet fixed by Congress. But we do and can ask that this Court minimize the danger inevitable in conspiracy cases, the risk that particular defendants will be prejudiced in fact by declarations of co-defendants which are inadmissible against them in point of law. And we submit that the proper and appropriate path to the attainment of that admittedly desirable goal is the adoption of the rule contended for by this petitioner, *viz.*, that admissions must be corroborated by proof of the *corpus delicti* which shall be at least sufficient to show that a crime has been committed by someone, and which is independent of statements by any defendant.

With such a rule in effect, there would be far less danger that a jury could unconsciously be influenced by inadmissible statements of co-defendants, since the jurors would then be instructed that they could not consider any confession or admission until they had first found, from evidence independent of statements by the particular defendant or by any co-defendant, that the crime charged had actually been committed by some person. Thus the emphasis would be on trustworthy independent evidence, admissible against

all, rather than, as at present, on statements by the very persons accused, which are admissible only against the declarant.

Petitioner is here contending for the adoption of the rule that a confession or an admission after-the-fact is inadmissible unless it is corroborated by proof, independent of what the accused said, of the *corpus delicti*, of the commission of a crime by someone.

This rule owes its modern origin to the prevalence of improperly obtained confessions. It now has the support of most of the circuits that have passed on the issue, and is moreover applied in all courts-martial, the military having abandoned the earlier and less stringent requirement for corroboration.

Adoption of the strict standard of corroboration is certain to have two beneficial effects. First, by the emphasis placed on proof independent of what the defendant said that a crime has been committed by someone, improperly obtained confessions will necessarily be discouraged. If they are inadmissible, the incentive to procure them is necessarily lessened. Second, the same emphasis on independent evidence, which will be admissible against all defendants in conspiracy prosecutions, will materially minimize the danger now inherent in such prosecutions, that statements of co-defendants will be admitted in fact to the detriment of those against whom they are inadmissible in law.

Rarely if ever in the administration of criminal justice has there been presented to this Court a similarly fruitful opportunity for prophylactic adjudication.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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APPENDIX

STATUTES INVOLVED

Title 18, United States Code

§2. Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

* * * * *

§281. Compensation to Members of Congress, officers and others in matters affecting the Government

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress.

* * * * *

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.